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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 190

THE CONNECTICUT FIRE INSURANCE COMPANY,
Petitioner,

against

ALLEN N. SPOONER & SON, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner,

against

ALLEN N. SPOONER & SON, INC.,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Statement

Petitioner's statement is satisfactory to respondent with the exception of the sentence on page 4, reading:

> "*However, the Coast Guard blockage was not completely effective* and vessels continually passed up and down the river (31a)." [italics added]

The opening italicized statement is correct, having been lifted verbatim from Finding 21 (reproduced in the petition at App. 10). But the balance about vessels continually passing is gratuitous, misleading and not supported by the cited reference. We call attention to this lest it create an impression that the large vessel which passed the salvage site and kicked up the swells that caused this casualty was just one of many which passed by the scene prior to the accident. That would be wrong because the record is clear that just one large vessel, a freighter, passed and created the swells which caused the No. 12's

demise. That freighter was not supposed to pass, or expected to pass, because the Coast Guard was holding up traffic in the East River while the salvage operation was going on. Hence, the swells from the freighter were fortuitous and this factor of fortuity supplied an important element of the "peril of the sea", against which the No. 12 was insured. The significance of this fortuitous element will become apparent on laying the facts of this case against those in *Reisman* v. *New Hampshire Fire Ins. Co.*, 312 F. 2d 17, the decision of the Fifth Circuit which petitioner erroneously claims to be in conflict with the decision below.

ARGUMENT

Reasons for Denial of the Writ

1. There is no conflict between the decision below and the Fifth Circuit's decision in *Reisman*, 312 F. 2d 17. (Answer to Point A of the Petition).

In *Reisman* a houseboat simply sank in her berth *without* any fortuitous occurrence or event—in waterfront language, "she just faded away" (*The Jungshoved*, 2 Cir. 1923, 290 Fed. 733, 735, cert. den., 263 U. S. 707). On raising the boat it was found that her bottom was in a worm-eaten, deteriorated condition and, absent any other explanation, the Court held that the cause of the sinking was this deteriorated, worm-eaten condition which, of course, was not an insured peril under this Court's decision in *Hazard's Administrator* v. *New England Marine Insurance Co.*, 8 Pet. 557 (1834). In contrast, Pulling Machine No. 12 was sound and seaworthy in every respect (F. 3, App. 3; F. 11, App. 7). But, as the Court of Appeals said, she was

> "engaged in an extremely delicate operation. Without the use of side slings, the No. 12 could tilt only three degrees without danger to the derrick

> Shipping above and below the site of operations was held up, so as to prevent swells. Under these circumstances, the swells caused by the passing freighter were unanticipated and extraordinary, and constituted a 'peril of the sea' within the meaning of the policy." (314 F. 2d 753, 756; App. 36).

Nothing in this cogent reasoning is at odds with the Fifth Circuit's holding on worm-decay in *Reisman*. Hence, petitioner is forced to turn back to the earlier decision of the Second Circuit in *New York, New Haven & Hart. R. Co.* v. *Gray*, 240 F. 2d 460, cert. den., 353 U. S. 966, reh. den., 354 U. S. 943 (1957), arguing that it conflicts with *Reisman*. This argument scarcely seems apposite here but even if it were, brief analysis will demonstrate it to be groundless and incorrect.

The cargo loss in *Gray* was not from ordinary worm-decay but from a "concatenation of fortuitous circumstances" (240 F. 2d 460, 465) and it is purely fanciful for petitioner to claim that the cases "are irreconcilable" so that the Fifth Circuit, if it followed *Gray*, "would have been compelled to allow a recovery" in *Reisman* (Petition, pp. 9-10). The ground put forward by petitioner for that claim and the asserted decisional conflict is that in *Gray* the Second Circuit followed English precedents which, one would suppose, must mean that the Fifth Circuit did not in *Reisman*. But that cannot be so; for in the very excerpt from the opinion quoted in the petition (p. 8), the court relied on the leading English marine insurance work, viz., "Arnold on Marine Insurance, 13 Ed. § 825 (312 F. 2d 17, 20)."

Moreover, petitioner has gone far astray in claiming broadly that ever since *P. Samuel & Co., Ltd.* v. *Dumas*, [1924] A. C. 431, it has been "well settled law in England that the mere incursion of sea water is a peril of the sea—unless deliberately allowed to enter the vessel." (Petition, p. 11, n. *). That case merely held that inasmuch as a wilful scuttling of the ship did not involve any *fortuitous* sea-action or occurrence, her resultant loss could not be

attributed to a peril of the sea within policy coverage. The House of Lords did *not*, as petitioner claims, overrule or in any wise modify its decision, only three years before, in *Mountain* v. *Whittle* [1921*] 1 A. C. 615, or the rule there reiterated (p. 626) that

> "There must be some special circumstance, such as heavy waves causing the entrance of the sea, to make it a peril of the seas."

Significantly, petitioner here stresses that under that case "the law in England had been similar to that applied in the United States." (Petition, p. 11, n. 1). This being so, the same holds true today; for, not only was that case not overruled by *P. Samuel & Co., Ltd., supra*, but twenty years later in *Canada Rice Mills, Ltd.* v. *Union Marine & Hull Insurance Co.* [1941] A. C. 55, 69, the House of Lords, after again explaining the need for fortuity in an insured sea peril, pointed to *Mountain* v. *Whittle* to illustrate "how slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea."

That the force or severity of the sea-action can not alone be the test has long been settled, both in England and in this country, because, as the court below aptly observed, much

> "depends, of course, on the nature of the vessel and operation involved. *Compania de Navegacion Interior, S. A.* v. *Fireman's Fund Ins. Co.*, 277 U. S. 66, 80 (1928); *Klein* v. *Globe & Rutgers Fire Ins. Co.*, 2 F. 2d 137 (3d Cir. 1924)."—[314 F. 2d 753, 756; App. 35-36]

This common-sense approach to the question whether this loss or any loss was due to an insured sea peril does not in any way dispense with the need for fortuity and it was the complete lack of that vital element which made inevitable the Fifth Circuit's decision in its worm-decay case.

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* Miscited in petition as "[1912]"—p. 11, n. 1.

Reisman. To paraphrase the House of Lords in *Canada Rice Mills, Ltd., supra*, [1941] A. C. 55, 69, there was not even a "slight degree of the accidental or unexpected," and the decision would have been the same in England or the Second Circuit. Indeed, *Reisman* was a made-to-order application of the statement in *Mountain* v. *Whipple, supra*, that "if the water was in normal condition and got into the houseboat simply owing to the defective character of the seams there could be no loss by the perils of the sea." ([1941] 1 A. C. 615, 626).

There is no conflict between *Reisman* and the decision below that the swells from a large freighter, not supposed to pass and not expected to pass, were a "peril of the sea" within policy coverage.

II. The decision below is in direct and complete accord with the decisions of this Court. (Answer to Point B of the Petition.)

(a) *Perils of the Sea*

The argument of petitioner resembles its Point A except that now the decisional conflict is claimed to be with another worm-decay case decided by this Court in 1834, *Hazard's Administrator, supra*, 8 Pet. 557. The theory of this asserted conflict rests entirely on an oblique reference below to that case, which was cited by the court in a footnote, to illustrate its view that once upon a time several decisions in this country departed from the English courts' consistent "broad reading" of the perils clause by restricting "perils of the sea" to

> "extraordinary and calamitous occurrences. See *e.g., Hazard's Administrator* v. *New England Mar. Ins. Co.*, 33 U. S. (8 Peters) 557, 583 (1834); . . . ."—(314 F. 2d 753, 755, n. 2; App. 34, n. 2).

From this reference of the court to *Hazard's Administrator* it follows, says petitioner, that the decision below conflicts

with it and so, with the law laid down by the decisions of this Court. Passing for the moment the obvious question whether that worm-decay decision could ever be in conflict with this fortuitous swells decision, a more basic fallacy in petitioner's argument is that it disregards the thrust of this Court's unanimous decision in *Compania de Navegacion Interior, S.A. v. Fireman's Fund Ins. Co.*, 277 U. S. 66, 69 (1928), which cannot be brushed off by petitioner's lifting selected excerpts from the opinion (Petition, pp. 12-13).

In *Compania* a small inland tug foundered on a sea voyage in choppy seas which, though not of extraordinary violence, were too much for the vessel to withstand, despite her being in seaworthy condition. Agreeing with the District Court that the tug's underwriters were liable for the loss, this Court rejected underwriters' contention that the term "peril of the sea" has an absolute meaning which invariably requires the seas concerned to be such as would, if considered in the abstract, fall within some descriptive phrase like "of extraordinary nature", or "of overwhelming force", etc., etc. Instead, this Court took the view that in a marine policy "peril of the sea" is a relative term which depends on the nature of the vessel insured and of the operation being performed by her at the time when the casualty happened. Notably, this Court adopted the following common-sense approach of the District Court:

> "What amounts to a light breeze, or a small swell, or a choppy sea, as logged for a large ocean-going steel vessel, would be relatively, if logged for a little inland wooden tug, with two or three foot of freeboard, an extremely dangerous gale and rough sea." (277 U. S. 66, 79)

True, as petitioner points out (p. 13), this Court supported its views on the relative meaning of an insured sea peril by referring to the circumstance that a

high premium was charged in the particular case; but, it is specious for petitioner's counsel to extrapolate from this reference that, absent evidence of a high premium,* the term "perils of the sea" in a marine policy turns into a term of absolute meaning requiring a degree of severity or force describable by an adjective such as "overwhelming", "extraordinary" or the like, taken in its literal or abstract sense.

That the real thrust of *Compania* is that which the court below cited the case for (this brief, *supra*, p. 4; 314 F. 2d 753, 756; App. 35-36), stands out most prominently from this Court's citation and approval in *Compania* of the Fourth Circuit's decision and reasoning in *Klein* v. *Globe & Rutgers Ins. Co.*, 2 F. 2d 137, 139, 140 (so cited at 277 U. S. 66, 80)—a case where the court held that as the swells met by an insured barge were "extraordinary to it," its resultant loss was caused by a peril of the sea. The District Judge (whose opinion was expressly adopted by the Court of Appeals, 2 F. 2d 137, at 144) reasoned as follows:

> "What are the 'perils of the seas' contemplated in the policy? In their excellent and exhaustive brief, counsel for the respondent have undertaken to answer the query by the citation of a number of cases wherein the term is defined. Nearly all, if not all, of those cases had as subject-matter policies of insurance upon sea going vessels, and while we adopt the underlying principles which led to the definitions, we cannot accept the literal definitions because of the variation between the underlying facts of the instant case and those of the cases cited. *In arriving at the meaning of the terms in the present policy, we must keep in mind the kind of boat insured, the voyage contemplated, and the nature of the risk assumed.*

* Note that although no higher premium rate was charged here, the underwriter was apprised in advance of Pulling Machine No. 12's engagement for the salvage operation and, at the respondent-assured's request, increased the amount of the insurance on her (F. 10, App. 6).

> ** * * the 'perils of the seas' against which it was insured were such perils as would be extraordinary to a boat of its type.*" (italics added)

In concluding on the "perils of the sea" point, we now turn back to comment briefly on the decision in *Hazard's Administrator, supra*, and the reference made to that case below. That decision simply held that, since in the waters where the insured vessel traded, worms would ordinarily perforate any vessel's bottom and produce decay, the loss of the insured vessel from such worm-decay was due to "an ordinary occurrence" and not to an insured peril of the sea (8 Pet. 557, 584). This was the only point of law "laid down" (Petition, p. 13) and the point on which the decision has been followed over the years, most recently again by the Fifth Circuit in *Reisman, supra*, 314 F. 2d 17, 20; compare the earlier cases collected in Rose's Notes on the United States Supreme Court's Reports, Rev. Ed. 1917, p. 1330. To be sure, the opinion contains language to the effect that the perils of the sea within policy coverage are understood to be "extraordinary occurrences only; such as stress of weather, winds and waves, lightning, tempests, rocks, &c. (8 Pet. 557, 584)." But that broad dictum * is not inconsistent *per se* with the later decisions, here applicable and correctly applied by the court below; or, putting it another way, the court read more into the *Hazard's* dictum than necessary in citing it as an historical reference. That innocuous reference cannot be stretched into a springboard for either claim of decisional conflict made in this petition.

(b) *Inchmaree Clause (Petition, pp. 13-16)*

There was no real dispute at the appellate level that Stasch was master of Pulling Machine No. 12 so that his negligence in failing to use her side slings on board brought

* Evidently recognized as such by the court below which introduced its citation with the standard dictum signal, "See".

her resultant loss directly within the stated coverage of loss "through the negligence of master" (Libellant's Exh. 1, third photostat at 12a). The cogent reasoning of the Court of Appeals that this coverage was not destroyed or nullified by the later proviso excepting loss "from want of due diligence by the owners of the ship * * * or by the manager," is set forth in 312 F. 2d 753, 757-758 (App. 37-38) and is fully supported by the Inchmaree decisions there cited. We need not repeat the court's reasoning here but will demonstrate that, even had there been no prior judicial authority, the court's reasoned analysis and interpretation of the opening coverage section of the Inchmaree Clause vis-a-vis its exclusory proviso would stand firmly on its own feet for the plain reason that there is no other way to make the clause meaningful or effective. Consider the common case of the individual owner who runs his own boat, *i.e.*, is her master. Damage at sea through his negligence falls squarely within the opening or coverage section of the clause; but, no, says this petitioner-underwriter, the coverage so afforded is destroyed by the proviso at the end of the clause because there the master becomes "the owner" and his negligent operation of the vessel at sea a "want of due diligence by the owners" excluded from the coverage. Indeed, a similar paradox would exist for the small corporate owner assured whose vessel is entirely in charge of one man at all times. When its master's seagoing negligence reaches the proviso, this petitioner would again convert it to a "want of due diligence" excepted as "by the manager." So in the end the only owner assured who might be covered for loss through the master's negligence at sea would be the shipowner large enough to delegate sea going command to a master and appoint someone else as the vessel's "manager." But even this might not make the cover effective; for, unless one accepts the reasoned view of the court below that the proviso does not apply at all to seagoing or operational negligence, then, under this petitioner's stated position, the master could turn out to be

the seagoing "manager," since at sea he alone fits petitioner's definition of "manager" as one with "direction and physical or managerial control" of the vessel (Petition, p. 15).

We need not pursue the point further, but, before leaving it, will say a word here about petitioner's discourse on an extract from the policy's proof of loss clause, although that is added at the end of Point C of the petition (pp. 17-19). That afterthought was disposed of simply and succinctly by the Court of Appeals (314 F. 2d 753, 758; App. 39, 40) and reargument was not applied for. Thorough analysis of the policy proper and Inchmaree endorsement would demonstrate the court's conclusions to be completely sound and correct but this is not the time nor place for the demonstration. Note, however, as to the Perils Clause, that the policy there states fully what is a "condition precedent to *liability*" (Libt's Ex. 1, p. 11a—opening clause; italics ours); and, as to the Inchmaree Clause, added by endorsement (12a, third photostat), its special coverage expressly rejects policy conditions "conflicting herewith" and those so rejected must, perforce, include subdivision (a) of the proof of loss provision, here relied on by petitioner. Subdivision (a) purports to make the assured show the vessel to be "seaworthy," against which it is basic that Inchmaree protection covers certain types of unseaworthiness, e.g., "any latent defect" (See the full clause, App. 6).

Further comment on petitioner's conjectures about what the court below held or did not hold in dealing with this aspect of the case (Petition, p. 18) would not be justified. It is enough to say that in no event can this narrow construction point be made worthy of this Court's attention or consideration.

III. Nothing in this case merits review of the decision below by this Court. (Answer to Point C of the Petition.)

As is plain from all authorities, the one feature common to all "perils of the sea" cases is that the issue turns largely on the facts and, indeed, the main contest at trial here was on the factual issues raised. Moreover, this particular case involved a factual situation which, if not unique, was surely special and not likely to recur or come close to being repeated. Hence, a decision by this Court, whether one way or the other, would be of little importance to anyone but this underwriter and this assured. No "change in the ground rules" (Petition, p. 17) is evidenced by the decision below as neither before nor after its rendition was there a whit of justification for this or any underwriter's thinking it could avoid payment for a loss caused, as this one was, by the insured vessel's being subjected to a swell which happened fortuitously and which, in the factual setting existent, was, in a real sense, an extraordinary occurrence for her. Nothing in the decision below warrants fears or suppositions by this petitioner or any other underwriter that the Second Circuit considers a loss from worm-decay or other ordinary occurrence to be covered by the perils clause and, at all events, until in some future case that court so holds, there is no occasion for this Court to speak again on the meaning of "perils of the sea" in a marine insurance policy. Its views were made clear enough thirty-five years ago in the *Compania* case, *supra*, 275 U. S. 66, and applied correctly by the Court of Appeals in this case.

Further, the Inchmaree Clause has been correctly held to cover the loss of the No. 12 in any event; and, unless captious criticism has become one, this petition presents no ground whatever for asking this Court to review that carefully reasoned holding of the Court of Appeals.

CONCLUSION

The petition should be denied.

Dated: New York, N. Y.,
July 2, 1963.

Respectfully submitted,

HERVEY C. ALLEN,
Counsel for Respondent.